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Supreme Court of the United States

DERRICK KIMBROUGH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF *AMICI CURIAE* OF THE FEDERAL PUBLIC AND COMMUNITY DEFENDERS AND THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. § 3553(a) must be construed to require that the sentencing court both consider the guideline offense level and independently evaluate the nature, circumstances, and seriousness of the offense, even if this leads to disagreement with Sentencing Commission determinations such as the 100:1 crack/powder cocaine ratio.

2. Whether 18 U.S.C. § 3553(a)(6)'s requirement that the court consider the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct must be construed to permit the sentencing court to disagree with guideline offense levels in a given case.

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae include all of the Federal Public and Community Defenders in the United States, save the one representing the Petitioner in this matter and in No. 06-7949, *Gall v. United States*. Federal Public and Community Defenders have offices in 88 of the 94 federal judicial districts, and we represent thousands of individuals who are sentenced each year. The National Association of Federal Defenders is a nationwide, non-profit organization whose membership includes Federal Public and Community Defenders and their attorneys and other staff. The issues presented in this case are of great importance to our work and the welfare of our clients.

SUMMARY OF ARGUMENT

The district court properly evaluated and sentenced this case under 18 U.S.C. § 3553, and the Fourth Circuit was wrong to vacate and remand the resulting sentence. After hearing argument, the district court explained, consistent with § 3553(a)'s requirements, that the sentence was to be imposed in order to "reflect the seriousness of the offense, to afford adequate deterrence to Mr. Kimbrough's criminal conduct, to protect the public from further crimes committed by the defendant, and to provide the defendant with needed educational or vocational training, medical care or other correctional treatment in

[1] The parties have consented to the filing of this brief and copies of letters of consent have been lodged with the Clerk of the Court. No counsel for a party authored any part of this brief. Sup. Ct. R. 37.6. No person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of the brief.

the most effective way." Joint App. at 72. The court then stressed that a sentence should not be imposed that "was greater than necessary" to achieve those objectives. *Id.* Having properly described the law, the district court then ruled that to "impose a sentence of 19-22 years in this case [would be] ridiculous. It imposes more punishment, given the record . . . than is necessary to accomplish what needs to be done." *Id.* The resulting sentence was reversed by the Fourth Circuit because it did not adhere strictly to guideline § 2D1.1's 100:1 ratio between powder cocaine and crack cocaine.

The district court properly read, independently and in the disjunctive, those parts of § 3553(a) that required it to consider the nature and circumstances of the offense (§ 3553(a)(1)), the seriousness of the offense (§ 3553(a)(2)(A)), the guidelines (§ 3553(4)), and the need to avoid unwarranted disparities (§ 3553(a)(6)). In vacating this sentence, the court of appeals conflated these independent considerations. By requiring the judge to follow the 100:1 ratio between powder cocaine and crack cocaine, the court of appeals robbed § 3553(a)(1) & (2)(A) of meaning independent of the guidelines' assessment of the nature, circumstances, and seriousness of the offense, which is expressed through the 100:1 ratio and already accounted for in 18 U.S.C. § 3553(a)(4). Similarly, by conflating the need to avoid unwarranted disparities with the uniformity supposedly created by the 100:1 ratio, the court of appeals drained 18 U.S.C. § 3553(a)(6) of any independent meaning.

Unlike the court of appeals, the district court gave meaning to the Parsimony Clause of 18 U.S.C. § 3553(a), which requires that a sentence be "sufficient, but not greater than necessary" to comply with the goals of § 3553(a)(2). While the court of appeals ignored the Parsimony Clause in

mandating strict adherence to the 100:1 ratio, the sentencing judge properly employed it to order and weigh relative to one another the § 3553 factors as they applied to Petitioner so as to "impose a sentence sufficient, but not greater than necessary . . . ."

The Fourth Circuit Court of Appeals, like many of its sister circuits, mandates strict adherence to the 100:1 ratio in part because of its view that a break from this ratio would constitute an "unwarranted disparity." This reflects an improper reading of the portion of the statute which directs the avoidance of unwarranted disparities, 18 U.S.C. § 3553(a)(6). That statute does not require the imposition of the 100:1 ratio; rather, it supports giving similar sentences to those with similar records found guilty of similar conduct. Here, the sentencing judge determined that crimes relating to cocaine, whether in crack or powder form, were relatively similar. This is certainly a reasonable view, particularly given the support for that idea from the Sentencing Commission itself. Thus, it was neither unwarranted nor did it create a disparity.

ARGUMENT

I. To Give Meaning To All the Provisions of 18 U.S.C. § 3553(a), District Courts Must Be Permitted to Disagree with the 100:1 Ratio Between Amounts of Powder and Crack Cocaine.

At the heart of this case is the district court's decision to reject the 100:1 powder/crack cocaine ratio found in sentencing guideline § 2D1.1(c), saying it was "clearly inappropriate and greater than necessary to accomplish

what the statute says you should in fact accomplish in this case." Joint App. at 74. The district court, in independently reviewing the case and ultimately rejecting the 100:1 ratio, was following the directives of 18 U.S.C. § 3553(a), if that statute is read to avoid redundancies. In this way, the district court was complying with, not ignoring, the properly expressed will of the legislature.

Amici agree, for the reasons set out in Petitioner's principal brief, that the Fourth Circuit's decision to vacate the sentence is erroneous. They submit this brief to suggest the application of well-established principles of statutory construction in the interpretation of 18 U.S.C. § 3553(a). Effect should be given to the plain language of every provision of a statute, and application of this principle to § 3553(a) clearly requires the sentencing court both to consider the Sentencing Commission's evaluation of an offense as reflected in the guidelines, and to make its own independent evaluation of the nature, circumstances, and seriousness of an offense. In this case, that proper and independent consideration led to a sentence outside the guideline range dictated by the 100:1 ratio once those factors were balanced relative to one another according to the Parsimony Clause.

A. To Avoid Redundancy, a Sentencing Judge Must Consider the Nature, Characteristics, and Seriousness of the Offense Independent of Guideline Elements Such as the 100:1 Ratio.

There are two separate and distinct portions of 18 U.S.C. § 3553(a) that address the seriousness of a given type of offense, such as trafficking in crack cocaine. One of these is the guideline range itself; § 3553(a)(4) expressly

requires consideration of the guideline range found to apply. As this Court held in *Rita v. United States*, 127 S. Ct. 2456, 2463 (2007), the guideline range (through the offense level score) reflects and incorporates the Sentencing Commission's view of the § 3553(a) factors. This is especially true as to the seriousness of the offense, since the Commission's evaluation of that factor necessarily plays a large role in the Commission's job of creating relative offense levels for various types of crime. *See* 28 U.S.C. § 994(c) (requiring Commission to consider gravity of the offense in promulgating offense categories). Accordingly, the district court was required to consider the Commission's apparent judgment, expressed through the 100:1 ratio, that one crime (dealing crack) is much more serious than another (dealing powder cocaine).

However, there is another, distinct part of the controlling statute that specifically and separately directs the sentencing court itself to consider "the need for the sentence imposed to reflect the seriousness of the offense . . . ." 18 U.S.C. § 3553(a)(2)(A). Unlike § 3553(a)(4), this directive does not refer to the guidelines; it stands on its own. Thus, there are two distinct mandates in 18 U.S.C. § 3553(a) that the sentencing judge consider "seriousness of the offense" – once via the offense level score provided by the guidelines, and again in independently determining the sentence to impose.

The Fourth Circuit would conflate these two independent clauses. It effectively defines the meaning of 18 U.S.C. § 3553(a)(2)(A) as an evaluation of seriousness of the offense that is limited to the guideline score already considered under 18 U.S.C. § 3553(a)(4). Affirming the Fourth Circuit would mean that the district court's consideration under (a)(4) of the seriousness of crack offenses (as

included in the guidelines through the 100:1 ratio) also fulfills the distinct mandate of (a)(2)(A). By this reading, a district court has no ability to evaluate the seriousness of the offense because the guidelines have already done so conclusively, leaving no factor-weighing role for the district court.

The problem with the Fourth Circuit's view is that it renders 18 U.S.C. § 3553(a) redundant, since both § 3553(a)(2)(A) and § 3553(a)(4) would direct the sentencing judge to the same expression of seriousness of the offense contained in the guidelines through the 100:1 ratio. Two parts of the statute would mean the same thing.

Such a construction is plainly improper. Reading the language of 18 U.S.C. § 3553(a)(2)(A) as redundant, rather than reading it to require an independent evaluation of the seriousness of that type of offense by the sentencing court, runs contrary to this Court's direction that statutes should not be construed in a way that renders one part inoperative. *Colautti v. Franklin*, 439 U.S. 379, 392 (1979). As this Court has recognized, "[i]t is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that . . . no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001). Indeed, Congress is presumed to have given each word in a statute specific and important meaning. *Id.* The words of an express act of Congress should not be rendered meaningless by the interpretation the Fourth Circuit has provided.

The same logic applies to § 3553(a)(1)'s directive that the sentencing court consider the "nature and circumstances" of the offense. The guidelines, with their complex multi-factor lists of aggravating circumstances, should not

prevent the sentencing court from properly giving independent meaning to (a)(1)'s directive that it also analyze those circumstances. Similarly, the nature of the offense cannot be defined solely by the guidelines; because a district court is not simply allowed, but required to consider independently the nature of the offense, that court must be permitted to disagree with conclusions of the guidelines, so long as it considers them.

If all of § 3553(a) is to be given effect, then § 3553(a)(1) & (a)(2)(A)'s directive that a judge consider the nature, circumstances and seriousness of the offense cannot mean that the district court merely looks to the guidelines. Rather, a proper reading of the statute insists that the judge must *independently* evaluate the nature, circumstances and seriousness of that type of offense in addition to considering the determination reflected in the guideline score. In the context of a crack cocaine case, that means the sentencing judge must independently evaluate the use of the mechanism through which the guidelines describe the seriousness of crack cocaine offenses – the 100:1 ratio.[2]

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[2] The same logic extends to 18 U.S.C. § 3553(a)(6), which directs the sentencing judge to consider whether a sentence gives rise to an unwarranted disparity. The (a)(6) requirement must mean something different than simply following the guidelines, as that is already accounted for within the statute. The proper role for the requirement of 18 U.S.C. § 3553(a)(6) that a judge consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct" is fully explored in Part II of this brief.

B. The Sentencing Court's Consideration of the Seriousness of the Offense Is Not Restricted to the Particularized Circumstances of the Case Before It.

One response to the argument set out above might be to claim that there is no redundancy because 18 U.S.C. §§ 3553(a)(2)(A) and (a)(4) have separate functions. By this view, 18 U.S.C. § 3553(a)(4) establishes the seriousness of a *type* of offense (for example, through the 100:1 ratio contained in the guidelines for crack cocaine), while § 3553(a)(2)(A) separately directs the court to consider the seriousness of a *particular* defendant's crime, allowing for consideration of individualized circumstances that do not necessarily apply to the entire category of cases of that type.

This construction of the statute avoids one redundancy by creating another. There are two basic types of individualized circumstances: those relating to the individual defendant as a person (such as an impressive history of service to the community), and those that relate to the offense itself (such as particularly cruel conduct). Both of these types of individualized circumstance are already accounted for in § 3553(a)(1), which requires that "[t]he court, in determining the particular sentence to be imposed, shall consider . . . circumstances of the offense and the history and characteristics of the defendant." Thus, both types of individualized circumstances already must be considered by the sentencing court before even reaching the mandate that seriousness of the offense be considered. To avoid making its language inoperative, 18 U.S.C. § 3553(a)(2)(A)'s directive to consider seriousness of

the offense must mean something other than the individualized circumstances of the case.[3]

In the end, if all of § 3553(a) is to be given effect, it is inescapable that 18 U.S.C. § 3553(a)(2)(A) affirmatively directs a sentencing court to independently evaluate the seriousness of the offense, which may mean disagreeing with the Commission's evaluation of seriousness described by and through the 100:1 ratio. That is exactly what the district court did below, and it was justified in doing so by Congress' statutory mandates in 18 U.S.C. § 3553(a).

C. This Court's Opinion in *Rita* Supports Independent Evaluation of the 100:1 Ratio By a Sentencing Judge.

Allowing evaluation of the seriousness of an offense, independent of guideline determinations such as the 100:1 ratio, finds support not only in the language of 18 U.S.C.

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[3] In addition to rendering either § 3553(a)(1) or § 3553(a)(2)(A) superfluous, this "separate function" analysis mistakes the nature of the guidelines themselves. In addition to a base offense level for each type of crime, the offense guidelines in Chapter Two of the *Guidelines Manual* ordinarily include numerous specific adjustments fashioned for application on the individual facts of a particular defendant's case. For example, guideline § 2D1.1, in addition to setting the base offense level for crack offenses using the 100:1 ratio, also includes adjustments for such things as death or bodily injury (§ 2D1.1(a)(1), (a)(2)); use of a weapon (§ 2D1.1(b)(1)) or private aircraft (§ 2D1.1(b)(2)); distribution in prison (§ 2D1.1(b)(4)); and the discharge or transportation of hazardous wastes (§ 2D1.1(b)(8)(A)). These sorts of adjustments do not reflect the *type* of offense, but instead the Sentencing Commission's consideration of individual characteristics. Congress expressly contemplated that the guidelines would take such particularized facts into account; § 994(c) requires the Commission to consider "the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense." 28 U.S.C. § 994(c)(1).

§ 3553(a), but also in the language of this Court's decision in *Rita*.

The majority opinion in *Rita* made it clear that the imperatives of 18 U.S.C. § 3553(a)(2)(A) apply to both the Sentencing Commission and to sentencing judges. 127 S. Ct. at 2463. The Sentencing Commission first looks to those imperatives to create offense level factors such as the 100:1 ratio, and then district courts subsequently and independently look at both those same purposes and the Commission's conclusion (via the guidelines) before imposing a sentence. *Rita* found it fair to assume that the guidelines, so far as practicable, reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives. *Id.* at 2465. As Justice Breyer described it in *Rita*, the Commission deals with these objectives at "wholesale," while the District court does so at "retail." *Id.* at 2463.[4]

Rita's approach to 18 U.S.C. § 3553(a) avoids rendering any part of the statute superfluous by reading § 3553(a)(2)(A) to require a judge to independently evaluate the seriousness of offenses by category, not just in light

[4] Justice Breyer's wholesale/retail analogy fits the argument advanced here, too. After all, wholesalers suggest a price (the "Manufacturer's Suggested Retail Price") which retailers then will take into consideration as they set their own prices, just as sentencing judges must consider the "price" described by the guidelines. That is not the end of the story, though, or prices would be uniform for any given good. Instead, retailers will subsequently and independently set a price for a category of items that takes into account their own observations about the market, which may or may not agree with those of the wholesaler. There may at times be uniformity at wholesale (since there is only one seller), but rarely at retail will the same level of uniformity exist. Nor should it: It is the job of each retailer to determine what price the market will bear for a certain good. Sentencing judges, in performing their analogous function, must make a similar independent evaluation.

of individualized circumstances. It reflects an understanding that the Commission should seek to incorporate § 3553(a)(2)(A) in creating guideline ranges, meaning that when a guideline case reaches the sentencing judge those purposes must be freshly considered, even though broad policy concerns are involved, because to do otherwise would render parts of the statute superfluous.

The majority opinion in *Rita* did more than affirm the sentencing judge's authority to independently evaluate categories of offenses; it also made clear that the judge was free to disagree with the guidelines:

> [The sentencing judge] may hear arguments by prosecution or defense that the Guidelines sentence should not apply, perhaps because (as the Guidelines themselves foresee) the case at hand falls outside the "heartland" to which the Commission intends individual Guidelines to apply, USSG § 5K2.0, *perhaps because the Guidelines sentence itself fails properly to reflect § 3553(a) considerations*, or perhaps because the case warrants a different sentence regardless.

127 S. Ct. at 2465 (emphasis added); *see also id.* at 2468 (a party may contest the sentence by arguing "that the guidelines reflect an unsound judgment"). Thus, this Court has already concluded that it is proper to argue exactly the point made by the defense and adopted by the district court below – that a guideline (such as § 2D1.1(c) with its 100:1 powder/crack ratio) fails generally to properly reflect the seriousness of the type of offense at issue.

D. In Applying 18 U.S.C. § 3553(a), the Parsimony Clause Should Serve as a Guide to the Weighing of the Relative Importance of Sentencing Factors.

In ruling that the 100:1 ratio must be strictly followed, the Fourth Circuit implicitly suggested that the factors in 18 U.S.C. § 3553(a) have a hierarchy – that at least sometimes, such as in crack cases, the guidelines trump the other factors. After the excision of § 3553(b) in *United States v. Booker*, 543 U.S. 220 (2005), nothing in the statute itself substantiates this claim. In fact, the statute refutes it.

The statute is clear on two important points. First, the sentencing judge must consider each of the § 3553(a) factors. Second, the sorting mechanism to be employed in weighting those factors is the Parsimony Clause of § 3553(a), which insists that the sentencing judge "shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection." Importantly, the directive to consider the seriousness of the offense is contained in that paragraph (2).

In reversing Petitioner's sentence, the Fourth Circuit effectively held that the 100:1 ratio must be employed, even if it results in a sentence the district court believed was greater than necessary to achieve the goals of sentencing. This ruling establishes a weighting of the § 3553(a) factors that flies in the face of the proper sorting mechanism, as there is nothing in the broad application of the harsh 100:1 ratio which achieves the goals of the Parsimony Clause. Blanket application of the 100:1 ratio guarantees that the sentence will sometimes be (in the view of the sentencing judge) greater than necessary to comply with the purposes set out in 18 U.S.C. § 3553(a)(2).

This Court should clearly state the proper role of the Parsimony Clause: To order the relative importance of the § 3553(a) factors so that the resulting sentence is not overly severe. In a case such as this one, the district court must be allowed to determine that giving conclusive weight to the 100:1 ratio will not fulfill the requirements of parsimony, particularly where a sentencing judge's view of a § 3553(a)(2) factor such as seriousness of the offense weighs against employment of the 100:1 ratio.

II. 18 U.S.C. § 3553(a)(6) Does Not Require Deference to Policies Embodied in the Guidelines, but, Rather, Authorizes an Independent Judicial Inquiry Into Whether Any Contemplated Sentence Would Give Rise to an Unwarranted Disparity.

At the same time that it failed to give effect to the provisions of 18 U.S.C. § 3553(a)(1), (a)(2), and (a)(4), the Fourth Circuit also based its decision in this case on an incorrect interpretation of 18 U.S.C. § 3553(a)(6). In holding that a "sentence that is outside the guidelines range is *per se* unreasonable when it is based on a disagreement with the sentencing disparity for crack and powder cocaine offenses," the Fourth Circuit relied on its earlier decision in *United States v. Eura*, 440 F.3d 625 (4th Cir. 2006), *petition for cert. filed*, No. 05-11659 (U.S. June 20, 2006). Joint App. at 98. *Eura*, in turn, rested on the court's belief that "giving a sentencing court the authority to sentence a defendant based on its view of an appropriate ratio between crack cocaine and powder cocaine would inevitably result in an unwarranted disparity between similarly situated defendants in direct contradiction to the specific mandate of 18 U.S.C. § 3553(a)(6)." 440 F.3d at 633 (citations omitted). The interpretation of (a)(6) embodied

in this statement reflects two erroneous assumptions: that a sentencing court's modification of the guidelines' 100:1 ratio necessarily produces an "unwarranted disparity" within the meaning of (a)(6), and that (a)(6) may trump the sentencing court's weighing of (a)(2) factors under the Parsimony Clause. Neither assumption is supportable.

A. A Sentencing Court's Rejection of a Guidelines Policy Does Not *Per Se* Constitute an Unwarranted Disparity Under 18 U.S.C. § 3553(a)(6).

By its own terms, § 3553(a)(6) is not addressed to guidelines compliance, but to "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." Here, "unwarranted sentence disparities" has a specific meaning, referring exclusively to disparities "among defendants with similar records who have been found guilty of similar conduct." The text thus addresses a more precise concern than does the Fourth Circuit's loose rendering of (a)(6) as a mandate "to bring about increased uniformity in the sentencing of similarly situated defendants." *See Eura*, 440 F.3d at 633. What makes defendants similarly situated under (a)(6)? The text provides a clear answer: They must have similar records, and they must have been found guilty of similar conduct. Any form of disparity other than disparity among defendants with similar records who have been found guilty of similar conduct thus lies beyond the purview of (a)(6). Because sentences outside of the guidelines – whether or not based on a policy disagreement – may or may not give rise to the relevant form of disparity, it is incorrect to assume, without further analysis, that imposing a non-guidelines

sentence is "in direct contradiction to the specific mandate of 18 U.S.C. § 3553(a)(6)." *See Eura*, 440 F.3d at 633. Instead, it is crucial for the sentencing court first to identify the set of defendants who "have been found guilty of similar conduct." Indeed, once this analysis is undertaken, it may become apparent that a *guidelines* sentence would produce just the sort of disparity that is discouraged by (a)(6).

1. A Non-Guidelines Sentence Is Not *Per Se* A Disparate Sentence Under 18 U.S.C. § 3553(a)(6).

In enacting the Sentencing Reform Act (SRA), Congress established separate mandates for the sentencing court to consider both the guidelines and the need to avoid unwarranted disparities. *Compare* 18 U.S.C. § 3553(a)(4), *with* 18 U.S.C. § 3553(a)(6). At the same time that Congress enacted (a)(4) and (a)(6), Congress also directed the Sentencing Commission to draft sentencing guidelines that might – indeed, to some extent, were required to – take into account a multitude of factors going beyond merely the defendant's record and the conduct for which he was found guilty. *See, e.g.*, 28 U.S.C. § 994(c) (authorizing Commission to take into account, *inter alia*, "nature and degree of harm caused by the offense," "public concern generated by the offense," and "the deterrent effect of a particular sentence"); § 994(d) (authorizing Commission to take into account a variety of offender characteristics in addition to criminal history); § 994(n) (requiring Commission to assure that "the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed . . . to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an

offense"). Indeed, as demonstrated by both the text and legislative history of the SRA, Congress expected that the guidelines would reflect a form of "real-offense sentencing" – that is, that the guidelines would take into account a variety of offense characteristics in addition to the specific conduct of which the defendant was found guilty. *See, e.g.*, 28 U.S.C. § 994(c)(2) (authorizing Commission to take into account "circumstances under which the offense was committed"); S. Rep. No. 98-225, at 168, *reprinted in* 1984 U.S.C.C.A.N. 3182 ("There would be expected to be . . . several guideline ranges for a single offense varying on the basis of aggravating and mitigating circumstances."). And real-offense sentencing is what the Commission delivered, going so far as to permit consideration of acquitted conduct. *See United States v. Watts*, 519 U.S. 148 (1997).

In this context, § 3553(a)(6) becomes a reminder to the sentencing court – notwithstanding the complex array of factors made relevant by the guidelines – that two particular factors merit special consideration: the defendant's record and the conduct of which the defendant has been found guilty. Viewed this way, (a)(4) and (a)(6) are not redundant, but complementary, requiring the sentencing court to balance the sometimes competing goals of, on the one hand, adhering to a complex guidelines system designed to account for collateral conduct and further a multitude of purposes, and, on the other hand, also achieving some measure of uniformity based on just two factors of particular importance (record and the conduct of which the defendant has been found guilty).[5]

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[5] A contrary interpretation of (a)(6), in which the provision was viewed as simply requiring or encouraging the selection of a guidelines sentence, would, of course, run afoul of the principle that statutes

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The legislative history supports both the specific definition of disparity apparent in the text and the concerns about real-offense sentencing implicit in that definition. In the words of the Senate Judiciary Committee Report, the SRA "establishes *two factors* – the prior records of offenders and the criminal conduct for which they are to be sentenced – as the *principal determinants* of whether two offenders' cases are so similar that a difference between their sentences should be considered a disparity." S. Rep. No. 98-225, at 161 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182 (emphasis added).[6] Meanwhile,

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should not be interpreted so as to render any provision superfluous. *See supra* Part I.A. Moreover, depending on how much additional weight the guidelines were given, such an interpretation of the statute might also run afoul of the principle that interpretations creating constitutional problems should be avoided. *Cf. Rita*, 127 S. Ct. at 2477-78 (Scalia, J., concurring in part and concurring in the judgment) (arguing for interpretation of SRA excluding substantive reasonableness review in light of constitutional problems). Nor would the redundancy and avoidance problems necessarily be cured by interpreting (a)(6) only to require compliance with the *policies* embodied in the guidelines, rather than compliance with the guidelines ranges, thereby theoretically permitting a non-guidelines sentence on the basis of case-specific sentencing factors not covered by guidelines policies. Not only does the distinction lack any apparent basis in the text of (a)(6), but the domain of "policy" is potentially so expansive as to leave little more room for judicial discretion than in the pre-*Booker* regime. There are, in fact, few recurring sentencing factors of any real significance that are not at least arguably covered by one of the guidelines or the Commission's associated policy statements. Even many of the most important offender characteristics, although receiving far less detailed treatment than offense characteristics, are expressly addressed in Part 5H of the guidelines (if only to be categorized as not, or not ordinarily, relevant).

[6] If there is any doubt about the limited scope of the term "criminal conduct for which they are to be sentenced," the Committee Report also uses the term "convicted of similar offenses" in its discussion of disparity, *id.*, which even more clearly indicates a rejection of real-offense factors in determining whether a disparity exists. For a more complete review of the relevant legislative history, showing that the

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concerns over the potential extremes to which real-offense sentencing might go were voiced in particularly strong form by the House Judiciary Committee Report. H.R. Rep. No. 98-1017, at 98 (1984) ("The legislation does not authorize, nor does the Committee approve of, the use of sentencing guidelines based on allegations not proved at trial. To permit 'real offense' sentencing guidelines would present serious constitutional problems as well as substantial policy difficulties.").[7]

Given that the determination of a guidelines sentence is based on a much broader set of factors than is the determination of disparity under § 3553(a)(6), there is no reason to assume that a guidelines sentence necessarily avoids disparity, or that a non-guidelines sentence gives rise to disparity.

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term disparity contemplated a comparison of the offenses of conviction, *see* Michael M. O'Hear, *The Duty to Avoid Disparity: Implementing 18 U.S.C. 3553(a)(6) After* Booker, 37 McGEORGE L. REV. 627, 641-43 (2006).

[7] To be sure, the final version of the SRA more closely resembles the Senate bill than the House bill. *See* Marc L. Miller & Ronald F. Wright, *Your Cheatin' Heart(land): The Long Search for Administrative Sentencing Justice*, 2 BUFF. CRIM. L. REV. 723, 745 (1999). This does not mean, however, that the views of the House Committee should be regarded as irrelevant. Indeed, based on the last-minute addition of the Parsimony Clause to the Senate bill, there is good evidence that the Senate intended, through § 3553(a), to accommodate, rather than simply reject, the House's concerns regarding the guidelines. *See id.* at 746-47.

2. Section 3553(a)(6) Requires an Independent Judicial Inquiry Into Whether Any Contemplated Sentence Would Give Rise to an Unwarranted Disparity.

By its plain terms, § 3553(a)(6) calls for a two-step analytical process: First, the sentencing court must determine whether a contemplated sentence would give rise to a disparity; and second, the court must determine whether the disparity is warranted. In the first step, as discussed above, the sentencing court should identify as a basis for comparison the group of other defendants "with similar records who have been found guilty of similar conduct." The use of the term "similar conduct," as opposed to "same conduct," indicates that the court may consider a broader group of defendants than those who have been convicted of a crime identical to that of the defendant being sentenced. Neither the statute nor the legislative history clearly indicates what makes criminal conduct "similar," implicitly leaving the matter for the sentencing court to resolve in light of the broad purposes of the SRA.

Thus, in a crack cocaine distribution case, a sentencing court might appropriately identify *all* cocaine defendants distributing comparable quantities (whether in powder or crack form) as the appropriate comparison group. After all, as the Sentencing Commission itself has made clear, defendants convicted of crack offenses have engaged in criminal conduct that is "similar" to those convicted of powder offenses, in light of the recognized purposes of sentencing. *See, e.g.*, United States Sentencing Commission, *Report to Congress: Cocaine and Federal Sentencing Policy* 62 (2007) (hereinafter 2007 Report) ("Crack cocaine and powder cocaine are both powerful

stimulants, and both forms of cocaine cause identical effects.").

Upon finding a disparity in the guidelines' treatment of, say, cocaine offenders, the sentencing court would next have to decide whether imposing a guidelines sentence incorporating the disparity would be "unwarranted." As with "similar conduct," the statute does not define "unwarranted," leaving it to the sentencing court to decide, consistent with the general purposes of the SRA, which disparities are of concern. In a crack case, for instance, a sentencing court might appropriately determine that, in light of the similar seriousness of crack and powder offenses, the 100:1 ratio represents unwarranted disparity.[8] *See* 2007 Report at 8 ("The current quantity-based penalties overstate the relative harmfulness of crack cocaine compared to powder cocaine . . . [T]he 100-to-1 drug quantity ratio significantly undermines the various congressional objectives set forth in the Sentencing Reform Act.")

When the sentencing court has determined both that a contemplated sentence would give rise to a disparity and that the disparity would be unwarranted, the court must then, in the words of the statute, "consider . . . the need to avoid" such a disparity. This is not a statutory mandate to *eliminate* the disparity, but rather to give attention to the disparity right along with the remaining sentencing factors under 18 U.S.C. § 3553(a). The implication is that the sentencing court should strike a balance, seeking to

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[8] The court might also take into account the disparate racial impact of the 100:1 ratio, *see* 2007 Report at 8, in light of the SRA's particular concern with *racial* disparities. *See, e.g.*, 28 U.S.C. § 994(d) ("The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race . . . of offenders.").

mitigate serious unwarranted disparities in ways that do not unduly compromise competing objectives embodied elsewhere in § 3553(a).[9] Sometimes, the balance will point towards a guideline sentence; other times, it will point towards a sentence outside the range.

While this approach to § 3553(a)(6) may be more demanding than merely placing a thumb on the scales in favor of the guidelines sentence, (the approach suggested by the reasoning in *Eura*), it need not be especially burdensome to sentencing courts. As this Court explained in *Rita*, a sentencing judge need only "set forth enough to satisfy the appellate court that he has . . . a reasoned basis for exercising his own legal decisionmaking authority." 127 S. Ct. at 2468. If the considerations of (a)(6) and the other factors in § 3553(a) lead a judge to decide "simply to apply the Guidelines to a particular case, doing so will not necessarily require lengthy explanation." *Id.* And when these considerations lead the judge to impose a sentence outside the guidelines, he need merely "explain why he has done so." *Id.* In the instant case, for example, the district court expressly considered the § 3553(a) factors, applied them to Petitioner and his offenses, and determined the punishment "necessary to accomplish" the goals of federal sentencing. Joint App. at 72. Such a statement,

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[9] In deciding how much weight to give to (a)(6), it may be appropriate to consider whether mitigating a disparity relative to one group of similarly situated defendants (e.g., the total set of cocaine defendants) would aggravate a disparity relative to a different set of similarly situated defendants (e.g., crack defendants). Where there are competing unwarranted disparities, the weight given to (a)(6) might be minimized, or the court might seek to find a middle ground that avoids extreme disparities relative to either group.

while brief, was legally sufficient. *Cf. Rita*, 127 S. Ct. at 2469.[10]

Nor does the (a)(6) analysis, though discretionary, render the guidelines meaningless or promote wild variation in sentencing practices. Even when application of the guidelines cause disparities within the meaning of (a)(6), sentencing courts may often find the disparities to be "warranted." And in those cases where tensions are found between (a)(4) and (a)(6), nothing in the statute indicates that (a)(6) must necessarily be given more weight. Finally, the discretion contemplated by (a)(6) is limited in direction and magnitude, authorizing only the mitigation of unwarranted sentencing disparities. Thus, a sentencing court finding that the 100:1 ratio gives rise to unwarranted disparity might properly invoke (a)(6) as a basis for some reduction in a crack sentence, but not a basis for either a sentence increase or a sentence reduction that goes below the norm for defendants "with similar records who have been found guilty of similar conduct."[11]

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[10] As the Court noted in *Rita*, where nonfrivolous reasons are provided, but not accepted, "Sometimes the circumstances will call for a brief explanation [of the sentencing court's decision]; sometimes they will call for a lengthier explanation." 127 S. Ct. at 2468. Appellate review will then involve "merely ask[ing] whether the trial court abused its discretion." *Id.* at 2456 (quoting *Booker*). Although *Rita* did not deal with an argument for a non-guidelines sentence based specifically on (a)(6), there is no apparent reason why the general standards articulated in *Rita* would not apply in the present context.

[11] This is not to say such sentences are impermissible, merely that (a)(6) does not provide support for them.

B. The Mandate of 18 U.S.C. § 3553(a)(6) Is Subordinate to the Parsimony Clause.

In any given case, whether (a)(6) lends greater support to a sentence inside or outside the guidelines range, the statute makes clear that (a)(6) is not some sort of a trump card that dominates all other factors. Rather, as demonstrated in Part I above, all of the § 3553(a) factors should be considered and weighed relative to one another according to the Parsimony Clause of 18 U.S.C. § 3553(a). Where (a)(6) is merely something that the sentencing court "shall consider," the statute mandates that the court "shall impose" a sentence that satisfies the requirements of parsimony. Thus, while (a)(6) may be helpful and appropriate to weigh as a factor in selecting a sentence within the parameters of what is "sufficient, but not greater than necessary, to comply with the purposes [of (a)(2)]," (a)(6) cannot justify, let alone require, the imposition of a guidelines sentence that is (in the words of the sentencing court in this case) "clearly inappropriate and greater than necessary to accomplish what the statute says you should in fact accomplish." Joint App. at 74.

The opinion of the Fourth Circuit seeks to mandate adherence to Congress' supposed will as expressed in the 100:1 ratio, but does not want to recognize the still-vibrant statutory directions of Congress that require avoiding the disparities inherent in the 100:1 ratio, giving meaning to parsimony, or mandating an independent judicial evaluation of the seriousness of a type of offense. The proper path is not to pick out of the statute one provision or another. Instead, courts should consider more than uniformity and the guidelines, and must give meaning to the whole statute if possible. Here, it is possible.

CONCLUSION

For all these reasons, together with those described in Petitioner's brief on the merits, the ruling of the Fourth Circuit should be reversed.

Respectfully submitted,

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